

State of New Hampshire



PERSONNEL APPEALS BOARD

54 Regional Drive, Unit 5
Concord, New Hampshire 03301

STATE OF NEW HAMPSHIRE PERSONNEL APPEALS BOARD

ERIC CALL

V.

N.H. DEPARTMENT OF SAFETY – DIVISION OF STATE POLICE

DOCKET # 2020-T-014

APPEARANCES: Attorney Marc Beaudoin represented the Appellant.
Attorneys Mary Maloney and David Hilts represented the State.

WITNESSES: Christina Martin
Director of Human Resources at the Department of Safety.
Colonel Nathan Noyes – Director – Division of State Police.

ISSUE OF LAW: Per 1003.01 thru 1003.04 - Whether the Appellant's termination for non-disciplinary reasons was unlawful, unjust, unreasonable or in violation of the rules.

APPEAL HEARING: The Board conducted a hearing on January 20, 2021 at the offices of the N.H. Banking Commission in Concord, N.H.

APPEAL TRIBUNAL: The presence of Commissioners Gail Wilson, Attorney Jason R.L. Major, Marilee Nihan and Attorney Norman Patenaude constituted a quorum.

BACKGROUND

The N.H. Department of Safety – Division of State Police (“DOS”) dismissed the appellant for non-disciplinary reasons on May 7, 2020. The appellant disagreed with that determination and requested a hearing pursuant to RSA 21-I:58, I and Per 1003.04 (a) (2).

FINDINGS OF FACT

The facts are derived from the record, the pleadings, and the testimony of the witnesses. DOS hired the appellant to work as a State Trooper on December 16, 2011. His record is devoid of any disciplinary actions and the incidents that led to the non-disciplinary dismissal occurred off duty. The appellant previously served on active military duty in Iraq and Afghanistan with the National Guard. He earned educational credits equal to three years of college. The essential duties of a state trooper include the enforcement of criminal and motor vehicle laws, ensuring public protection and safety, the detection and prevention of crimes, as well as the apprehension of suspects and prosecution of violators sometimes performed in extremely challenging and dangerous working conditions. The appellant is married and the father of four young children.

The appellant’s psychological history provided the context for the off-duty behaviors that called into question his fitness to continue working as a state trooper. The main elements were an unstable and unhappy childhood, parental substance abuse, dysfunctional family unit, chronic depression, post-traumatic stress disorder (“PTSD”) from active military combat duty, and alcohol abuse, the combination of which fueled the negative off-duty behaviors.

On New Year’s Eve, December 31, 2018, the appellant consumed excessive alcohol which led to a heated argument with his spouse. He consumed more alcohol to cope with it and suffered an emotional breakdown. He contacted a colleague from work for assistance under the agency’s peer-to-peer program and was driven to McLean Hospital in Belmont, MA for psychiatric evaluation. There he participated in the hospital’s recovery programs including living in a sober residence and was discharged to continuing out-patient services provided by Horizons Counseling Center in Gilford, N.H.

The appellant applied for a leave of absence from work under the Family and Medical Leave Act (“FMLA”) based on the certification of psychiatrist Dr. Julia Lushick from McLean Hospital dated January 24, 2019 which the appellant provided to DOS and DOS granted the leave on January 30, 2020. The form stipulated that he would be required to present a fitness-for-duty certificate for return to duty and that the certificate would have to address his ability to perform the essential functions of his job as a state trooper. Dr. Lushick wrote that the appellant was admitted for depression triggered by various life stressors, that he received pharmacological and psychological treatment at the facility for 30 days and that he was to be transitioned to the residential treatment setting after that to continue working on emotional management and positive coping skills. She explained that there was a possibility of recurrences in the future if the appellant encountered high levels of stress and/or failed to maintain his sobriety.

The appellant received medical clearance from his primary care provider ("PCP") on March 6, 2019 and reported for duty on March 11, 2019. While he was able to function adequately, he still did not feel better emotionally and continued to struggle in that period of early remission. He did not drink any alcohol for several weeks.

On April 19, 2020, a chain of electronic mail and text messages retrieved from his spouse's cellular telephone led the appellant to believe that his marriage was in jeopardy and triggered a painful emotional reaction. The appellant resorted to alcohol, inflicted superficial cuts on his chest and then decided to go for a run to clear his mind. This time his wife called a friend and work colleague to help the appellant cope with his situational stress. The officer caught up with the appellant on his run, drove him first to his home so he could change clothes, then drove him to Portsmouth Hospital for an assessment where the appellant remained until his friend drove him to McLean Hospital four days later.

At McLean Hospital the care providers adjusted the appellant's medications, revised his clinical diagnoses to include bipolar disorder, PTSD from earlier life experiences and mild alcohol abuse and they implemented a corresponding treatment plan with a duration of at least one year. He was released from McLean after a 10-day stay and transitioned to outpatient services at Horizons Counseling Center ("Horizons") until his acceptance into McLean's one-year outpatient program that provided both individual and group sessions. McLean arranged for community-based medication management with psychiatric APRN Sandy Moore Beinoras in Gilford, N.H. At Horizons the appellant acknowledged that alcohol was problematic for him and he developed a relapse prevention plan that included coping skills.

The appellant demonstrated motivation and commitment to maintaining his sobriety and attaining stability and he looked forward to getting back to work. His therapist, Lynne Towle, understood that plan but explained to him that Horizons only provided therapeutic services and as a matter of policy did not formally opine on the issue of fitness for duty leaving that function to other treatment providers. The treating psychiatrist at McLean, Dr. Asha Parekh, described the appellant as stable and with a good prognosis for recovery and discharged him on May 2, 2019. Dr. Parekh wrote in his safety assessment that the appellant could be safely released to outpatient treatment with a support network that included family, job and ongoing mental health treatment but cautioned the appellant that any alcohol relapse could jeopardize his recovery. He rendered a good prognosis for recovery, stated that the appellant had decision making capacity and declared that the risk of imminent harm to self or others was low. Another therapist, Elizabeth DiBenedictis, signed the DOS certification form and released the appellant for full unrestricted duty on July 19, 2019.

Before the appellant could return to duty, DOS requested supportive assessments from his treating providers. On September 13, 2019, the appellant executed the authorizations for the treatment providers to opine on his fitness to perform the essential duties of his job which were provided to them by the HR Director. On September 30, 2019, DOS sent its requests for assessment to the appellant's treatment providers.

Previously on August 15, 2019, however, the appellant's PCP, Dr. Ray Wilt, had already certified the appellant as fit for return to unrestricted duty on the DOS form. Also before September 30, the psychiatrist at McLean Hospital, Dr. Geoffrey Liu, had written on September 25, 2019, that there was no psychiatric contraindication to the appellant's return to full unrestricted duty conditioned upon the appellant's continued adherence to his treatment plan. Dr. Liu reviewed the essential duties with the appellant and signed the certification form. Following the receipt of the HR form, Dr. Wilt, who had treated the appellant for the past few years, restated his earlier opinion on October 8, 2019 that the appellant was physically and mentally able to perform the essential functions of a state trooper. The psychiatric APRN in charge of medication management, Sandi Moore-Beinoras, wrote on October 12, 2019 that, based on her discussions with the appellant, there were no symptoms that would impede his ability to do his job. DOS did not consider these assessments to be adequately responsive to its requests. These treating care providers rendered the requested assessments, but they did not elaborate with detailed narrative reports nor were they asked to do so on the form. DOS did not reach out to them for clarification and/or additional information. Nevertheless, on November 4, 2019 DOS notified the appellant of its intent to obtain the opinion of an independent medical examiner ("IME"), Eric Mart. Ph.D.

Dr. Mart conducted the IME on December 19, 2019 and issued his report three months later on March 10, 2020. He conducted a battery of psychological tests, interviewed the appellant, and reviewed the treatment records. The discussion delved into unpleasant childhood and homelife experiences including the absence of any stability in housing or schools, traumatic images from the battlefields in the Middle East, as well as negative behaviors fueled by depressive episodes and alcoholism that placed his marriage and his job in jeopardy. Dr. Mart noted that the appellant gave no indication of delusional or disordered thinking during the assessment. On the test for general reasoning ability the appellant scored well above average. The MMPI personality inventory test administered to reflect his current emotional state indicated that he was suffering from severe anxiety with undercurrents of anger and from depression with associated sleep disturbance. This profile was associated with marital turbulence and substance abuse. The appellant had an elevated score on the trauma symptom inventory with PTSD manifestations of nightmares, flashbacks, and intrusive thoughts. On the personality health scale, the appellant had a high score indicating that he possesses substantial ego strength and interpersonal resources which help mitigate other problematic aspects of his personality such as situational volatile emotions. In summary the evaluation indicated that the appellant possesses above-average reasoning abilities as well as intact cognitive abilities. At the time of the evaluation, the appellant was quite anxious and somewhat depressed and concerned that his emotions would overwhelm him.

Based on the results of the psychometric testing, Dr. Mart stated that the appellant had returned to his baseline condition as the appellant gave no indication of current depression or mania despite the pre-existing episodes of emotional volatility, anxiety, and depression. Most noteworthy was the appellant's complete sobriety since April 2019. Dr. Mart listed the clinical

diagnoses as bipolar disorder in partial remission, alcohol use disorder in early remission and PTSD. Dr. Mart noted that the appellant has continued to work diligently in therapy and to comply with all treatment recommendations, yet he hesitated to go along with the treating care providers on the appellant's fitness for return to duty because statistical studies suggested a risk of a relapse this early into remission. He ultimately opined that the appellant was not fit to return to duty.

Christine Martin is the Director of Human Resources ("HR") at DOS. She oversees the implementation of and compliance with all applicable state and federal employment and personnel laws and regulations for the Department's 1100 fulltime employees and is often involved with dismissals from service including the occasional termination for non-disciplinary reasons. She spoke about some of the accountabilities recited in the job description for state troopers who mostly work alone and are called upon to make many judgment calls under stress. Ms. Martin first became aware that the appellant had a behavioral health issue when he applied for FMLA leave in January 2019 following his hospital admission for depression. She and the appellant communicated by e-mail about his treatment plan and what documentation was needed for his return to duty. Another trooper made her aware of the second hospital admission attributable to life stressors similar to those for the first episode. She explained that the responses from the appellant's care providers did not provide the types of details about the appellant's fitness for duty that DOS was looking for. That prompted DOS to call upon an IME to provide that information. Her office did not follow up and ask the appellant's treatment providers for clarification and/or narrative reports. DOS accepted the IME's findings and conclusions and relied on them to make its decision to dismiss the appellant from state service. HR did not share the results of the IME with the appellant and/or allow his treating physicians to dispute or comment on the IME's findings and conclusions before the dismissal. The HR Director testified that her office just processes the paperwork.

Colonel Nathan Noyes manages the Division of State Police with its 500 employees both sworn and civilian. He assumed his position one month before DOS issued its notice of removal to the appellant. He agreed with the HR Director that the opinions from the treatment providers were lacking in detail, considered the impact of his actions on other troopers as well as on the appellant, expressed his concerns over possible recurrences in the future and ultimately accorded more weight to the opinion of the IME. It was unclear whether Colonel Noyes was aware of the fact that the appellant's treatment providers were not able to respond in detail to Dr. Mart's report. Colonel Noyes approved the recommendation to dismiss the appellant from state service and it was carried out on May 7, 2020.

In its closing summation the State referred to the appellant's two breakdowns in early 2019 that brought his psychological issues to the surface and that served as a basis for its difficult decision. It restated its position that the conclusions expressed by the treating care providers did not provide a clear enough basis including diagnosis and treatment upon which to make its decision. It argued that the IME report was more thorough with background information,

testing scores, interview and basis for the recommendation and that the State reached its decision after considering all available evidence. The State explained that the IME's concern for a risk of relapse down the road raised its own fear of exposure to liability. The State therefore accorded greater weight to the opinion of the IME when it reached its decision. It argued that its decision was reasonable and lawful, and it asked the board to affirm it.

On the other hand, the appellant acknowledged the occurrence of the two episodes, sought treatment, and more importantly, received a correct diagnosis with key changes in his medication after the second episode, complied with all treatment plans and remains proactive with his recovery. He noted that his PCP released him for return to full unrestricted duty as did the psychiatrist who treated him for a year at McLean. The LADAC counselor was not allowed to opine on his fitness for duty in accordance with Horizons' policy but she did not indicate that the appellant had any significant difficulties complying with his treatment plan or maintaining his emotional composure after the second episode. APRN Moore-Beinotas only managed his medication regimen and was therefore in no position to render a detailed opinion either. The appellant argued that the providers who submitted opinions were responsive to DOS' requests. The appellant argued that the State's dismissal was unjust and unlawful and in violation of Per 1003.01 (a) through (d) Per 1003.02 (e). He asked the board to accord greater weight to the opinions of the treating practitioners and to reverse his dismissal.

DECISION

The appellant must establish by a preponderance of the evidence that his dismissal was unlawful, in violation of applicable rules, unwarranted in light of the facts in evidence, or unjust pursuant to Per-A 207.12 (b).

Per 1003.01 (a) thru (d) sets the standard for removal for non-disciplinary reasons when:

- (a) The employee is physically or mentally unable to perform the essential functions of the position to which appointed;
- (b) The employee's physical or mental condition creates a direct threat or hazard for the employee, the employee's co-workers or clients of the agency, which cannot be eliminated except by removing the employee from the position;
- (c) The employee's presence in the workplace, because of the medical condition, is deleterious to the employee's health; or
- (d) The employee is a qualified individual with a disability who, with or without a reasonable accommodation, is unable to perform the essential functions of the position to which appointed.

Per 1003.02 (a) thru (d) requires the appointing authority to request a medical evaluation from the employee's treatment providers that details:

- (a) (1) a. the employee's general state of health related to performing the essential functions of the position, and
 - b. The specific nature of any relevant injury, illness, disability or condition which may affect the employee's ability to perform all of the essential functions of the position.
- (b) (1 and (2) requires the employee to authorize the release of his medical records to the appointing authority.
- (c) (1) thru (5) requires the appointing authority to provide to the treatment providers with specific details about the employee's job.
- (e) If the appointing authority determines that the information supplied by the employee's licensed health care providers is unresponsive to the assessment request, the appointing authority shall arrange to have an independent medical assessment of the employee performed, and
- (f) (1) bear the full cost of the assessment.

The outcome of this case hinges on whether the assessments from the treating care providers on the appellant's fitness for return to unrestricted duty were responsive to the State's requests and therefore negated the State's right to obtain an IME. To answer that question the board first restates some of the most relevant facts.

The appellant always functioned well on duty and often exceeded expectations as evidenced by his performance evaluations. Off duty, however, traumas from childhood and battlefield warfare haunted him and he coped inappropriately with chronic alcoholism and occasional superficial bodily self-harm. The failure to confront and tame his demons created serious marital friction which fueled more consumption of alcohol. These negative behaviors reached a boiling point in early 2019. The first of two breakdowns happened at home on New Year's Eve when the excessive use of alcohol led to a shouting match with his wife. He realized there was a problem and called some of his peers to come over for assistance. They took him to McLean Hospital for detoxification and a few days later he continued treatment through a community-based outpatient program. DOS approved his request for FMLA leave to cover his absence from work.

In early March 2019 the appellant's PCP, Dr. Wilt, released him for return to full unrestricted duty. The appellant remained sober for six weeks until he experienced a second breakdown on April 19, 2019 caused by marital stress. This time his wife called a friend and work colleagues for help. The appellant returned to McLean Hospital for longer and more intense treatment leading to revised diagnoses with pharmacological changes after which he was transitioned to an extended outpatient treatment plan that remains in effect. It was at McLean Hospital and at Horizons Counseling that the appellant acknowledged that alcoholism was causing most of the

negativity in his life and that he needed professional help to understand how various life stressors contributed to his general psychological malaise. This insight along with corrected diagnoses and medication opened the path to recovery.

Before the appellant could once again return to work, he had to provide assessments from his treatment providers on his fitness for return to full unrestricted duty. Per 1003.02 requires that the treatment providers opine on (a) the employee's general state of health related to performing the essential functions of the position and (b) the specific nature of any relevant... illness.....or condition which may affect the employee's ability to perform all the essential functions of the position. Subsection (b) is the easiest to answer. The clinical diagnoses recited by the treatment providers and the IME include depression, PTSD and alcoholism. Subsection (a) requires the board to analyze the medical records and the various assessments. DOS sent the 1-page form entitled "Fitness for Duty Certification" to Dr Wilt, Dr. Liu, APRN Moore-Beinotas and therapist Towle on September 30, 2019. The form only asked the providers to check off the correct box relative to either fitness for full unrestricted duty, modified duty or not fit to return to duty (See Joint Exhibit 9),

On August 15, 2019 the appellant's PCP, Dr Wilt, had already completed the form and released the appellant for return to full unrestricted duty and restated that opinion on October 9, 2019. One of the appellant's counselors, Elizabeth DeBenedictis, had done the same on July 9, 2019. The treating psychiatrist at McLean, Dr. Liu, wrote on September 25, 2019 that there were no psychiatric contraindications to the appellant's return to full unrestricted duty subject to continuing compliance with the treatment plan. APRN Moore-Beinotas, the appellant's LADAC counselor and medication manager, sent a report to DOS on October 12, 2019 in which she stated that there were no symptoms that would impede his ability to do his job, but no form accompanied that statement. The other counselor, Ms. Towle, explained that her office only provided counseling services and that agency policy prohibited her from giving a formal opinion on fitness for duty. Back on May 2, 2019 another psychiatrist at Mclean, Dr. Parekh, authored the discharge summary in which he described the appellant as stable with a good prognosis for recovery and with a low risk of harm.

Taken together, these five assessments satisfactorily respond to subsection (a) on the general state of the appellant's health and fitness for return to duty. The board considered them as a whole to be responsive to DOS' requests for assessments negating the need for an IME. The board took note of HR's high volume of paperwork for an agency of that size and that much of its time is devoted to processing forms, but it was troubled by the fact that DOS did not share the results of the IME with the appellant which would have accorded his providers an opportunity to dispute it or at least to comment on it before his dismissal as well as to understand the scope of detail that DOS apparently expected in a fitness for duty report.

In conclusion the board determined that the appellant complied with the provisions of Per 1003.02 (a)(1) by (a) providing undisputed clinical diagnoses and (b) a general state of his health and fitness for return to full unrestricted duty. The board accorded greater weight to the five aggregate assessments submitted by the treatment providers which the board determined together to be responsive to DOS' requests. The criteria for soliciting the IME under Per 1003.02 (3) were accordingly not satisfied and constituted a rule violation under Per-A 207.12 (b) (2).

The board found the appellant to be credible and on the right path to recovery with almost two years of sobriety at this point. The board invokes its broad authority under RSA 21-A:58, I to tailor the following decision to fit the circumstances of this case. The appellant needs a support system that includes family, work, friends, and therapy.

Based on all the evidence of record the board concludes that the appellant satisfied his burden of proof and established by a preponderance of the evidence that the State violated Per 1003.02 (3) and that he is fit for return to full unrestricted duty based on the totality of the medical evidence.

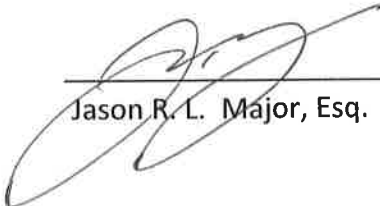
The board overturns the dismissal and reinstates the appellant with the following conditions:

1. The appellant will remain in active outpatient treatment as recommended by his treatment providers with appointment and meetings scheduled in a manner that will minimize the impact on his work schedule, and will continue to maintain his recovery;
2. The appellant will submit quarterly progress reports from one of his licensed treatment providers to HR and to the Board for one year to demonstrate continued compliance with the treatment plan and both entities will preserve the confidentiality of these medical records; the first report will be due on May 1, 2021;
3. The appellant will work a regular work week but on shifts approved by his health care provider(s) to accommodate the treatment plan and he will keep DOS apprised of his availability based on the recommendations of his treatment providers;
4. The appellant will also focus on preserving the integrity of the family unit for the sake of the young children – he must accordingly limit his availability for overtime and/or details to the equivalent of one shift per week for one year from the date of this decision; this condition is intended to reduce the level of stress both on the job and at home;
5. The State will reinstate the appellant to his rank and salary base retroactively to the date of his dismissal with full back pay and benefits;
6. The State will remove from the appellant's personnel file the letter of dismissal dated May 7, 2020.

7. The board retains the right to modify this decision for good cause at the request of the appellant, the State, or on its own motion as the interests of justice and public safety may require.

This is a unanimous decision.

Commissioner Gail Wilson



Jason R. L. Major, Esq.



Commissioner Marilee Nihan



Norman J Patenaude, Esq.

Date: _____

2/17/2021